

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
JUDGES O'CONNELL, FITZGERALD, MURRAY

WAYNE COUNTY,

Plaintiff/Appellee,

vs.

EDWARD HATHCOCK,

Defendant/Appellant.

Supreme Court Docket
No. 124070

Court of Appeals Docket
No. 239438

Wayne Circuit Court
Case No. 01-113583-CC

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BRIEF OF AMICI CURIAE
ADELL CHILDRENS FUNDED TRUSTS
(ORAL ARGUMENT REQUESTED)

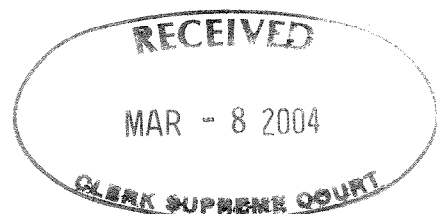


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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Amicus Curiae Robert Adell Childrens Funded Trust, Franklin Adell Childrens Funded Trust, and Marvin Adell Childrens Funded Trust ("Amici Curiae" or "Adell Trusts") join in the Statement of the Basis of Appellate Jurisdiction in Defendants-Appellants' Brief on Appeal ("Appellants' Brief").

QUESTIONS PRESENTED FOR REVIEW

A. Wayne County (the "County") filed this condemnation action to take Defendants' private property, and then convey that property to, and for the primary benefit of, other private persons for inclusion in an industrial park. Irrespective of constitutional considerations, the County could only take property for this purpose if the taking was expressly authorized by a state statute. The sole statute that the County invoked to support its proposed taking was MCL 213.23, which does not authorize takings for industrial parks. Did the County possess sufficient statutory authority to take Defendants' property?

The Wayne Circuit Court answered "yes."

The Court of Appeals answered "yes."

The County presumably would answer "yes."

Defendants answer "no."

The Adell Trusts answer "no."

B. If this Court replaced the *Poletown* test with a new test merely prohibiting actual governmental conveyance of taken property to other private interests, then condemnors would always avoid judicial scrutiny of their takings -- even those designed to benefit private interests -- simply by retaining governmental ownership of the taken property. Therefore, if this Court overrules or abrogates *Poletown*, should the replacement test protect owners against takings designed to benefit private interests even where their property will not be conveyed to those private interests?

The Wayne Circuit Court did not answer this question.

The Court of Appeals did not answer this question.

The County presumably would answer "no."

Defendants' answer is unknown.

The Adell Trusts answer "yes."

C. The existing *Poletown* standard protects condemnees whose property would be conveyed to private interests, and those whose property would not be so conveyed. Preserving the existing *Poletown* test, but adding a new element providing that takings for later conveyance to private interests are *per se*

unconstitutional, would still protect all condemnees. Should this Court preserve the *Poletown* standard with the addition of a new element, rather than eradicating the *Poletown* standard altogether?

The Wayne Circuit Court did not answer this question.

The Court of Appeals did not answer this question.

The County presumably would answer "no."

Defendants' answer is unknown.

The Adell Trusts answer "yes."

INTRODUCTION

In granting leave to appeal in this case, the Court directed the parties to address several issues: whether the County possesses statutory authorization under MCL 213.23, or otherwise, to take the Defendant landowners' property by eminent domain; whether the proposed takings are for a "public purpose" under *Poletown Neighborhood Council v City of Detroit*, 410 Mich 616; 304 NW2d 455 (1981); and whether the "public purpose" test set forth in *Poletown, supra*, should be overruled.¹ *Amici Curiae* Adell Trusts believe the first issue is dispositive on this appeal.

The County lacked statutory authority to take Defendants' property for the purposes that the County proposed. The County desired to take that property, assemble it with other properties that the County had already taken or wished to take, establish an industrial park, and then convey parcels in the industrial park to, and for the primary benefit of, private entities for use as manufacturing and related facilities. Under established law, even assuming the "purpose" of the taking passed constitutional muster, the County could only take private property for that purpose pursuant to express state statutory authorization. See *Detroit GH & M Ry Co v Weber*, 248 Mich 28, 32; 226 NW 663 (1929); see also, 3 Singer, *Sutherland Statutory Construction* §64.6 at p 345 (6th ed, 2001).

But to support its proposed taking, the County relied only on MCL 213.23, a statute that this Court has described as a "general enabling" statute, see *City of Lansing v Edward Rose Realty Co*, 442 Mich 626, 637; 502 NW2d 638 (1993), and which contains no authorization for the County to take property by power of

¹ The Court also invited the parties to address the issue of retroactivity.

eminent domain for the purpose of establishing an industrial park primarily benefiting other private owners. Indeed, the County has not invoked, let alone complied with, statutes like the Economic Development Corporations Act, MCL 125.1601 *et seq.* which, irrespective of their constitutionality, may have statutorily authorized the takings that the County pursued in this case. The County therefore cannot rely on such statutes, leaving it with no statutory basis upon which to take Defendants' property for the County's stated purpose.

This statutory issue is dispositive. The County may only take property when the Legislature has expressly granted such power, *see Edward Rose Realty*, 442 Mich at 631, and the County simply lacks power to effectuate the taking in this case. The other issues in this case implicate the Michigan Constitution, and this Court has stated in a number of decisions that it will not address constitutional issues when a case can be decided on a non-constitutional basis. *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). Indeed, the duty to avoid unnecessary constitutional decisions is one of the "most fundamental" principles of American constitutional adjudication. *See United States v Lovett*, 328 US 303, 320; 66 S Ct 1073; 90 L Ed 1252 (1946) (Frankfurter, J., concurring). As this Court stated in *Taylor v Michigan*, 360 Mich 146, 154; 103 NW2d 769 (1960), "Few principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort."² *See also, Ashwander v Tennessee Valley Auth*, 297 US 288, 347; 56 S Ct 466; 80 L Ed 688 (1936) ("The Court will not pass upon a constitutional question although properly presented by

² *Taylor* was recently disapproved on other grounds. *See Parkwood Ltd Dividend Hous Assoc'n v State Hous Dev Auth*, 468 Mich 763, 774; 664 NW2d 185 (2003).

the record, if there is also present some other ground upon which the case may be disposed of") (Brandeis, J., concurring). Thus, this Court should decide this case on statutory grounds, and leave the constitutional issue for a case that depends on that issue and only that issue.

Should this Court choose to reach the constitutional issue, however, it should conclude that the Court of Appeals misapplied the *Poletown* standard. Under that case, when a taking bestows benefits upon a private interest, the trial court examines with heightened scrutiny the claim that the public interest predominates. Before a taking will be permitted, this judicial "heightened scrutiny" requires substantial proof of a taking's clear and significant public benefits that predominate over the private benefits. See *Poletown*, 410 Mich at 634-35. Here, the only public benefit that the County could muster was that one day, the industrial park might increase the County's tax base and diversify its business mix. But it does not know when, how, or how much; it can offer only speculation.

On the other hand, the private benefits are clear. Private entities would be able to acquire property without the need to negotiate with the rightful owners, instead neatly securing the property from a County eager to convey it so as to fulfill its prognostications of economic success. The Court of Appeals' conclusion that the public benefit would predominate over the private benefits makes little sense, and its decision should be reversed.

Finally, and most importantly, if this Court chooses to revisit the *Poletown* test itself, *Amici Curiae* respectfully request that the Court consider a key point which, thus far, has not been squarely addressed by the actual parties to this case.

By its terms, the existing *Poletown* standard does not merely protect property owners in cases where the governmental agency will actually convey that property to other private interests. Rather, the test also protects owners where condemnors pursue takings for the direct benefit of other private interests, but will retain governmental ownership rather than convey the property to others. This broad applicability is very important; without it, condemning agencies would be empowered, and indeed motivated, to avoid "public use challenges" through the mere expedient of retaining title to property, even where the property is taken for distinctly private purposes. This is precisely what the City of Novi attempted in *City of Novi v Adell Childrens Funded Trusts*, 253 Mich App 330; 659 NW2d 615 (2002), *lv app pending* (Supreme Court Docket No. 122985), which is further discussed below. In short, where a condemnor takes property for a primarily private, not public, purpose, it does not matter whether the condemning agency or the private beneficiary ultimately holds title. A taking from one private owner for the benefit of another is unconstitutional in either instance. Therefore, if this Court modifies *Poletown*, it is imperative that the "new" test continue to protect owners in such cases of "non-conveyance."

Finally, many condemnors in 1981 hailed the *Poletown* decision as creating a "free pass" through future public use challenges, but those expectations have been proven false. The *Poletown* standard -- requiring substantial proof that a taking provides clear and significant public benefits that predominate over any private benefit -- has demonstrated itself to be protective of private property rights. Since *Poletown* was decided in 1981, the vast majority of decisions from this Court

and the Court of Appeals, as well as decisions from foreign jurisdictions, have applied the *Poletown* standard in furtherance of protecting private owners from abuses of the eminent domain power. Therefore, *Amici Curiae* Adell Trusts propose that, if this Court modifies *Poletown*, it should do so through the addition of an element to that existing test. In short, Michigan law should continue to require that, where the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court must inspect with heightened scrutiny the claim that the public interest is the predominant interest being advanced. But, where the condemnor intends to make an outright conveyance of the taken property to another private interest, the taking is *per se* unlawful. *Amici Curiae* believe that the addition of the latter element would preserve *Poletown's* existing protections, but take them one step further in defense of property rights.

Ironically, it was the *Poletown* court's *application* of its own test to the facts before it, not the test itself, that went awry, just as the Court of Appeals erred in its application of facts to law here. But in the end, it is the sheer absence of statutory authority upon which this Court should seize to correct the lower courts' wrongs.

STATEMENT OF FACTS

Amici Curiae Adell Trusts adopt and concur in the Statement of Facts presented in Appellants' Brief.

LEGAL ANALYSIS OF THE QUESTIONS PRESENTED

A. The County Lacked Statutory Authority in This Action to Take Private Property for an Industrial Park

This Court should reverse the Court of Appeals' decision because the County lacked statutory authority to take Defendants' private property -- non-consensually by eminent domain -- for an industrial park. The County has no inherent power to condemn property; its condemnation powers are limited to those that the Michigan Legislature has specifically bestowed upon it in state statutes. See *City of Lansing v Edward Rose Realty, Inc, supra*, 442 Mich at 631. In this case, the County invoked one statute, MCL 213.23, as the basis for its desired expropriation. Because that statute does not authorize the County to take Defendants' land for the primary benefit of another private owner, let alone for an industrial park, the taking is invalid.

This Court has clearly characterized the County's professed statutory authority, MCL 213.23, as a "general enabling" statute, see *Edward Rose Realty*, 442 Mich at 637, yet the Court of Appeals mistakenly held that this general statute was a singularly sufficient basis upon which to take Defendants' property for inclusion in a private industrial park. To support that decision, the Court of Appeals cited *Delta Twp v Eyde*, 389 Mich 549; 208 NW2d 168 (1973), and *Union Sch Dist v Starr Commonwealth for Boys*, 322 Mich 165; 33 NW2d 807 (1948). *Eyde* involved a taking for a sewer easement, and *Starr Commonwealth* involved a taking for a school. Neither involved a taking for conveyance to, or for the primary benefit of, another private owner, and neither supports the Court of Appeals' erroneous decision. Further, irrespective of constitutional limitations, the County

chose not to invoke, or comply with, other legislation that may have authorized the purported taking, so it cannot retrospectively rely on them for authorization. Whether the County's taking is statutorily authorized presents an issue of statutory interpretation that is reviewed de novo. See *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373; 663 NW2d 436 (2003).

This Court should begin and end its review of this case on the issue of the County's statutory defect. The other issues would require a constitutional decision by this Court: "Constitutional issues should not be addressed where the case may be decided on nonconstitutional grounds." *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001); see also, *United States v Lovett*, 328 US 303, 320; 66 S Ct 1073; 90 L Ed 1252 (1946) ("the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible") (Frankfurter, J., concurring).

1. The Power of Eminent Domain May Only be Exercised Pursuant to an Express Grant

Michigan law is unwavering in requiring that, through express terms or clear implication, every taking must be authorized by state statute. See e.g., *Chesapeake & O Ry Co v Herzberg*, 15 Mich App 271, 277; 166 NW2d 652 (1968). Even when the power of eminent domain is supported by such legislation, the extent of that power is limited:

A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication, and **when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.** *Detroit GH & M Ry Co v Weber*, 248 Mich 28, 32; 226 NW 663 (1929) (emphasis added).

See also, 3 Singer, *Sutherland Statutory Construction*, *supra* §64.6 at p 345 ("the policy has become well established that such grants are to be strictly interpreted against the condemning party and in favor of the owners of property sought to be condemned"). This judicial protection of private landowners acknowledges the inherently drastic nature of the power to condemn; a power that is particularly limited and scrutinized when exercised by municipalities:

The rule is premised on the view that the power of condemnation is in derogation of common rights because it is an interference with traditional and long established common law or statutory property rights. Where the power is sought to be exercised by a private, municipal, or other quasi-public corporation this rule is coupled with the policy of narrowly interpreting corporate grants of power. This makes for an extremely rigid limitation on the power of eminent domain. *Id.* at 347-349 (footnotes omitted).

This limitation is equally applied to counties, *Id.* at 350, and is uniquely appropriate here, where the County would "derogate" Defendants' private property rights by expropriating them for private beneficiaries in an industrial park.

2. *The Express Terms of MCL 213.23 Do Not Authorize the County's Purported Taking*

The statute invoked by the County in this case does not authorize its purported taking. It authorizes takings in only three instances:

Any public corporation . . . is authorized to take private property necessary [1] for a public improvement or [2] for the purposes of its incorporation or [3] for public purposes within the scope of its powers for the use or benefit of the public . . . MCL 213.23.

This statute does not expressly or even impliedly authorize taking private property for private use in an industrial park.

a. *The Purported Taking is Primarily for a Private Development, Not a Public Improvement*

The County's purported taking is not for a "public improvement," so MCL 213.23's first authorization does not support the taking. This Court can determine the meaning of "public improvement" by considering the Legislature's use of that term in the County Public Improvement Act, MCL 46.171 *et seq.* That Act specifically references MCL 213.23, see MCL 46.184, and addresses condemnation for "public improvements." Thus, the term "public improvement" must be consistent between these two statutes. See *Szydelko v Smith's Estate*, 259 Mich 519, 521; 244 NW2d 148 (1932) (the same words used in different statutes relating to the same subject should have the same meaning). The meaning of "public improvements" includes sewers, water-pumping stations, drains, and trash collection and disposal facilities. See MCL 46.171.

The definition of "public improvement" in no sense includes industrial parks, and the County's purported taking therefore fails the first step enunciated in MCL 213.23. In this regard, the County's purported taking draws a sharp contrast with the takings in *Eyde* and *Starr Commonwealth*, *supra*, which were for a sewer and a school, respectively.

b. *No Purposes of the County's Incorporation Support Taking Property for an Industrial Park for the Primary Benefit of Private Persons*

Second, the County's taking is not "for the purposes of its incorporation." Rather, the taking is to further a private development. The County cannot satisfy the second authorization in MCL 213.23. The trial court itself confirmed that, "The

County makes no argument that [this] second situation applies to our case..." Trial Court Op. at 5.

c. *The County's Purported Taking is Not for Public Purposes Within the Scope of the County's Powers for the Use or Benefit of the Public*

The County's purported taking is not "for public purposes within the scope of its powers for the use or benefit of the public," and it therefore does not fall within the third authorization in MCL 213.23. This authorization itself contains three components that must all be satisfied. See *Weber*, 248 Mich at 32 (requiring a "strict construction" of any grant of the condemnation power); see also, *Herzberg*, 15 Mich App at 277. The County's purported taking fails all three of these requirements.

i) *The Purported Taking is Not for Public Purposes or the Use or Benefit of the Public*

The County's attempted taking is not for public purposes or the use or benefit of the public. These two requirements are a statutory reiteration of the Michigan Constitution's public use requirement, which is discussed at length in Appellants' Brief and therefore is not repeated here. Irrespective of whether this Court reaffirms, modifies, or overrules its *Poletown* precedent, the public purpose of the County's proposed taking in this case is secondary to the private benefits to be conferred. The taking fails under both this statutory requirement and Michigan's Constitution.

ii) *The Purported Taking is Not within the Scope of the County's Powers*

The third authorization in MCL 213.23 requires that a taking must be within the scope of the County's powers. Again, the County has no inherent power of

eminent domain, but only the power that the Legislature has granted. *Edward Rose Realty*, 442 Mich at 631. In MCL 213.23, the Legislature granted the County the power to take property for public purposes within the scope of the County's powers. By definition, the scope of those powers must be defined in other statutes. Otherwise, this statutory language would be completely circular (the County cannot legitimately rely on language permitting condemnation "within the scope of its powers" as itself establishing that very scope). In fact, in *Edward Rose, supra*, when the city attempted to rely on MCL 213.23, this Court actually looked to the Home Rule City Act to identify the scope of the city's powers. *Edward Rose*, 442 Mich at 637.

One must therefore look to other statutes, not MCL 213.23, to define the scope of the County's powers. The Charter County Act, MCL 45.501 *et seq.*, generally defines the County's powers. The Act's preamble states that it provides "for the establishment of charter counties" and "prescribe[s] their powers and duties." Wayne County is a charter county, but nothing in this Act authorizes the County's attempt to establish an industrial park or to take private property for the benefit of another private owner.

The County Department and Board of Public Works Act, MCL 123.731 *et seq.*, is another source of County power. It allows the County to establish a public works department and authorizes takings to establish a water supply system, an erosion control system, a sewage disposal system, a refuse system, and a lake improvement system. See MCL 123.732, .744, .771. It does not authorize any

county to develop industrial parks, and it does not authorize takings from one private owner for another's benefit.

Likewise, the County Public Improvement Act authorizes establishment of water, sewer, and garbage facilities in and between municipalities located within the County. See MCL 46.171. This Act authorizes condemnation, but only for "exercising the authority herein granted to such county." MCL 46.184. So this Act only grants the power to establish the water, sewer, and garbage facilities mentioned, and only authorizes condemnation for such purposes. It does not authorize the County to establish an industrial park or to condemn property for such a park. The Court of Appeals purported to base its decision in part on this statute, but it failed to observe that this statute sets its own limit on the County's power to acquire property through eminent domain. This statute does not support a conclusion that the proposed taking in this case is statutorily authorized.

The Court of Appeals also cited the definition of "public improvements" from the Revenue Bond Act, MCL 141.101 *et seq.*, but that definition does not support the Court of Appeals' decision or the County's purported taking. To the contrary, it includes only improvements that are public in nature, like sewage disposal systems and public buildings. See MCL 141.103. The term does not include industrial parks.

The County Boards of Commissioners Act also cloaks the County with limited powers. See MCL 46.1 *et seq.* This statute authorizes the County commission to grant loans to facilitate private developments, see MCL 46.11(r), but it does not authorize the County to undertake developments on its own. The

Legislature's inclusion of the power to loan money for private developments indicates that it excluded the power for the County to establish developments itself or to take property for such developments. See *Bradley v Saranac Community Sch Bd of Ed*, 455 Mich 285, 298; 565 NW2d 650 (1997) (statutes that include one power imply the exclusion of other powers).

The County possesses various additional statutory sources of power, but none of them authorize development of industrial parks or taking property for the primary benefit of private interests. See e.g., the County Department of Solid Waste Management Act, MCL 45.581 *et seq*; the County and Regional Parks Act, MCL 46.351 *et seq*; the Recreation and Playgrounds Act, MCL 123.51 *et seq*; the Parks, Zoological Gardens and Airports Act, MCL 123.61 *et seq*; the Building Authorities Act, MCL 123.951 *et seq*; the Metropolitan Transportation Authorities Act, MCL 124.401 *et seq*; the Public Transportation Authority Act, MCL 124.451 *et seq*; the Emergency Services to Municipalities Act, MCL 124.601 *et seq*; the Housing Facilities Act, MCL 125.651 *et seq*; the Acquisition of Parks Act, MCL 141.321 *et seq*; the Acquisition of Property for Public Highways Act, MCL 213.361 *et seq*; and the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*. These statutes grant the County various powers and even authorize the County to acquire land in varying instances. They do **not** grant the County the power to take property for the establishment of industrial parks.

3. *The County Lacks Authority to Otherwise Take Defendants' Property*

The County has no general power to establish industrial parks. Further, irrespective of any constitutional analysis, the County did not and cannot rely on

any specific statute that purports to authorize municipal participation in private development: the County confirmed in verified interrogatory answers that its proposed taking was based solely and only on MCL 213.23. See Appellants' Brief on Appeal at 8. Moreover, the County neither attempted to, nor did, fulfill the affirmative requirements imposed by those specific legislative schemes.

The Michigan Legislature has enacted several specific statutes that govern municipal facilitation of, and takings for, private developments. These statutes include the Economic Development Corporations Act, MCL 125.1601 *et seq.*, the Downtown Development Authority Act, MCL 125.1651 *et seq.*, the Tax Increment Finance Authority Act, MCL 125.1801 *et seq.*, and the Blighted Area Rehabilitation Act, MCL 125.71 *et seq.* The County never sought to comply with any of these statutes. Each such statute prescribes comprehensive procedures that municipalities must follow when facilitating private developments. For example, the Downtown Development Authority Act requires the condemnor to designate the development area, hold public hearings, establish citizens district councils, and consult the citizens district councils before taking property for a development. MCL 125.1669. Such statutes purport to protect property owners by requiring significant public participation and input before a municipality establishes an economic development corporation, for example, and takes property from a private owner.

Irrespective of their constitutionality, these statutes prescribe procedures by which municipalities may take land for private developments, so no other manner can be used. *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 363; 459

NW2d 279 (1990); *Sebewaing Indus, Inc v Village of Sebewaing*, 337 Mich 530, 545; 60 NW2d 444 (1953) (stating that when a statute grants “powers and prescribes the mode of their exercise, that mode must be followed and none other”). If the County were permitted to take land for private, economic developments while ignoring the provisions of statutes addressing specifically that topic, then the Legislature would have performed a futile exercise in adopting these statutes. That, of course, would be contrary to the cardinal rule that the Legislature cannot be understood to have done a meaningless thing. See *In re MCI Telecommunications Complaint*, 460 Mich 396, 417; 596 NW2d 164 (1999).

Were the County authorized to condemn property under MCL 213.23 *et seq.* for the same purposes that it can condemn property under development legislation like the Economic Development Corporations Act, for example, then the County would never have reason to observe the strict requirements in the latter statute, such as forming an economic development corporation. Moreover, the County's theory -- that MCL 213.23 authorizes it to take property for private development -- violates the principle that the Legislature is aware of existing laws and enacts new laws in harmony with them. See *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). If MCL 213.23 itself authorized such takings, the Legislature would not have enacted statutes like the Economic Development Corporations Act; they would have been redundant.

The County was required to comply with one of these “specific” statutes to support its proposed taking: when considering two statutes that even arguably relate to the same subject matter, this Court considers them *in pari materia* and

reads them together, regardless of whether they were enacted together or reference each other. See *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). Both MCL 213.23 and private development statutes like the Economic Development Corporations Act, MCL 125.1601 *et seq.*, relate to condemnation, so they are *in pari materia*.

Obviously, the private development statutes specifically address taking land to facilitate private developments. But MCL 213.23, which this Court has already described as a “general enabling” statute, see *Edward Rose Realty*, 442 Mich at 637, does not address such matters at all. When statutes are *in pari materia*, and one is specific to a certain subject matter and the other is only general, the specific statute controls. See *Hill v Dep’t of Treasury*, 202 Mich App 700, 704; 509 NW2d 905 (1994); see also, 2B Singer, *supra* §51.05 at p 244-46. “This rule is particularly persuasive when one statute is both more specific and more recent.” *Hill*, 202 Mich App at 704. Thus, the specific statutes governing condemnation for private development, all of which were more recently adopted than MCL 213.23, prevail over the latter “general enabling” statute.

Despite these fundamental rules of statutory construction, the Court of Appeals decided that the County’s taking could proceed. That decision was erroneous. Setting aside for the moment their constitutionality (or lack thereof), the specific and comprehensive statutes governing takings for private development were the only grants of power available to the County here. The County did not invoke or comply with any of those statutes. The County therefore lacked statutory authority to support its proposed takings.

B. If This Court Overrules *Poletown*, The "New Test" Should Protect Owners In Both Cases of Actual Conveyance and Non-Conveyance of Title to Private Interests

Amici Curiae agree with many of the arguments set forth in Appellants' Brief on Appeal. On one critical point, however, Appellants' Brief is effectively silent: if this Court modifies or overrules *Poletown*, what will be the new eminent domain standard governing challenges to governmental assertions of "public use?" Appellants' Brief on Appeal merely urges that, "*Poletown* should be reversed and this Court should adopt a reading of Article 10, § 2 that limits the use of eminent domain to the taking of private property that is for public use." Appellants' Brief at 46.

While vague, Appellants' Brief seems to equate the notion of "public use" with mere public ownership. If that was Appellants' intention, the equation is clearly inadequate. In short, if this Court were to elevate the fact of "public ownership" of taken property as the key standard to replace *Poletown*, condemning agencies will be empowered, and indeed motivated, to circumvent "public use challenges" through the simple expedient of retaining title, even where takings will yield primarily private benefits. For example, it is indisputable that, if a governmental authority sought to condemn a strip of one landowner's property in order to create or expand a driveway for a neighboring landowner, the taking would violate Const 1963, art 10, §2. But under a legal standard that merely depends on continued public ownership of the condemned land, that same taking would be totally insulated from judicial review if the condemnor retained title to the condemned land instead of transferring it to the benefited property owner. The foregoing scenario is

not merely a hypothetical; it is the fact pattern in the case that this Court is currently holding in abeyance pending its decision on this appeal. See *City of Novi v Adell Childrens Funded Trusts*, 253 Mich App 330; 659 NW2d 615 (2002), *lv app pending* (Supreme Court No. 122985). It is also extremely similar to the fact pattern in *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001), where this Court struck down as unconstitutional the Private Roads Act, MCL 229.1 *et. seq.*

Notwithstanding the *Poletown* Court's misapplication of facts to law, the *Poletown* test itself protects private property owners in both cases of direct conveyance of their property to other private parties, and where condemning agencies seek to expropriate land for the primary benefit of others, yet retain title to avoid judicial scrutiny. Consider the *Poletown* test:

The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof that the public is primarily to be benefited. Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a Court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purposes stated by the Legislature. *Poletown*, 410 Mich at 634-35.

The *Poletown* standard therefore turns not upon mere "transfers," but upon benefits: who's getting them, and to what degree.³ The test governs **all** owners' challenges to governmental assertions of public use and public purpose, irrespective of whether the underlying property will actually be transferred to another private entity.

³ Ironically, the *Poletown* test derives from a case involving a direct conveyance of one owner's private property to another, yet by its terms, the test itself says nothing about a conveyance.

Adell clearly illustrates this point. In that case, the City of Novi attempted to take private property owned by *Amici Curiae* herein, the Adell Childrens Funded Trusts. The City sought the land in order to build a new access drive for the Adell Trusts' next-door neighbor. The next-door neighbor, the Wisne Company ("Wisne"), agreed to pay \$200,000.00 for the construction of its driveway, which would be named the "A.E. Wisne Drive," and which would run directly to Wisne's front door from a new thoroughfare (the so-called "Ring Road") being planned for that area. In exchange, the City agreed to retain ownership and maintenance responsibility over Wisne's new driveway. *Adell*, 253 Mich App at 345. Novi's City Manager promised Wisne that, in exchange for a substantial payment, the City would declare A.E. Wisne Drive "public;" it would be a "driveway" that Wisne would never have to maintain, and which would provide long-term benefits for Wisne. *Id.*

Despite Novi's proposal to retain ownership of the taken land, the *Adell* trial court ruled that, "Applying heightened scrutiny to the overwhelming evidence before this Court, this Court finds that the proposed...A.E. Wisne Drive is primarily for the benefit of Wisne, which benefit predominates over those to the general public." *Id.* at 333. The trial court therefore dismissed the action, and the Court of Appeals affirmed, observing that, "The fact that A.E. Wisne Drive is to be a public road does not, standing alone, automatically mean that the public purpose/public use would be advanced by its construction." *Id.* at 356.

This Court can readily see the danger in any proposal to replace the *Poletown* standard with a test that would merely limit the use of eminent domain to takings where the public would retain "ownership" of the taken property. Were this

Court to adopt such a narrow test, condemnors would be unbridled in their efforts to perpetrate the precise scheme that Novi undertook in *Adell*, namely, taking private land from one private owner to create new access for the direct benefit of another private owner, complete with funding from the benefited private owner in exchange for the condemnor's promise to retain ownership and maintenance responsibility over the access drive. Under any test that turns upon mere "conveyance," the actual private purpose behind such an attempted taking would be immune from judicial review.

Appellants' Brief correctly explains that the County's proposed taking in this case primarily benefited private interests, not the public. Appellants submitted a very fine Brief, but it omits discussion of a key point: if this Court chooses to overrule, or even modify, the *Poletown* standard, it needs a new or modified standard that protects condemnees in both instances of actual conveyance, and non-conveyance, of the taken property to private interests.

C. This Court Should Modify But Not Completely Abandon The *Poletown* Standard

Should this Court elect to address the Constitutional issue, it should **not** replace the *Poletown* test with a new standard that only protects owners in cases of actual conveyance to other private entities. *Adell, supra*, is only the most recent example of an unlawful taking, specifically designed to benefit a private entity, where the property would **not** be conveyed to that beneficiary. For example, in *Edward Rose, supra*, the City of Lansing attempted to condemn, and retain ownership of, an easement in an apartment complex to enable Continental Cablevision to offer cable television to apartment residents. Significantly, even

though the **public** would retain the easement, this Court determined that the taking was unconstitutional because the public benefit was secondary in comparison to the significant private benefits flowing to Continental. *Edward Rose*, 442 Mich at 641-42.

Similarly, in *City of Detroit v Shizas*, 333 Mich 44; 52 NW2d 589 (1952), the City of Detroit intended to take defendants' property for the construction of municipally-owned off-street parking facilities and for buildings that would be rented to others. The city did not intend to convey the defendants' properties to other private owners; the city itself was to retain ownership. In granting relief to the landowners, this Court held that, "Where...the intention to confer a private use or benefit forms the *purpose or a part of the purpose* of the proceeding or taking the power of eminent domain may not be exercised." *Shizas*, 333 Mich at 54 (internal citations omitted, emphasis in original). Thus, even prior to *Poletown*, actual "conveyance" of property to another private user was not the fundamental test employed by courts when determining the constitutionality of a proposed taking. Most recently, in *Adell*, Chief Judge Whitbeck reaffirmed the point:

Here, the City has not demonstrated that the public is primarily to be benefited from the construction of A.E. Wisne Drive. Rather, the [Drive] benefits specific and identifiable private interests, those of Wisne...The trial court correctly applied heightened scrutiny and we agree with its analysis. The public benefit here is not clear and significant; rather, it is speculative and marginal. The fact that A.E. Wisne Drive is to be a public road does not, standing alone, automatically mean that the public purpose/public use would be advanced by its construction. *Adell*, 253 Mich App at 356.

The foregoing cases represent several examples of unlawful takings where the expropriated property would remain within the condemning authorities' ownership. In each instance, the taking was judicially rejected because it was based upon a fundamentally private purpose designed to serve private beneficiaries. In the event that this Court totally overruled *Poletown*, and adopted a replacement test that was concerned only with whether an actual conveyance would occur, numerous, perhaps most, inherently "private" takings would avoid any scrutiny (let alone heightened scrutiny) upon mere proof of "public ownership."

Therefore, should this Court elect to revisit *Poletown*, *Amici Curiae* propose a simple modification to the *Poletown* standard, thereby creating a test that would continue to protect all owners confronted with proposed takings of their property. The existing *Poletown* standard, which requires the trial Court to apply heightened scrutiny to determine a taking's primary beneficiary as between a private interest and the public, should be reaffirmed with an additional element: takings for later conveyance to private entities are violative of the *Poletown* standard and unconstitutional *per se*. This test would go further in protecting landowners from governmental misuse of eminent domain, and at the same time protect owners in cases of non-conveyance, like those in *Shizas*, *Edward Rose*, and *Adell*.

In this regard, the Court should note that the majority of Michigan cases published since *Poletown* have applied the *Poletown* test in defense of private property rights and against abusive exercises of eminent domain. For example, six years after the decision in *Poletown*, the Court of Appeals in *City of Centerline v Chmelko*, 164 Mich App 251; 416 NW2d 401 (1987), held that there was no

substantial proof that taking property for the primary benefit of Rinke Toyota would predominantly benefit the public, despite some marginal economic gains. The Court approved dismissal of the case.

Likewise, in *City of Lansing v Edward Rose Realty, supra*, this Court held that taking easements that would have been used for the benefit of a private cable television company, though they would have been publicly-owned and would have yielded some public benefits, primarily benefited the cable company. It therefore affirmed the lower courts' decisions to dismiss the case. Next, this Court held in *Tolksdorf v Griffith, supra*, that taking private property to provide access and the possibility of development for a landlocked property primarily benefited the owner of the landlocked property. The public benefit of opening landlocked property was insufficient to justify a taking.

Most recently, the Court of Appeals in *Adell, supra*, held that Novi could not condemn property for a road where, though the road would remain "public," its primary purpose was improved access for a specific private interest. In all these cases, the Michigan courts faithfully applied the analysis of "public use" from *Poletown*, which has proven quite protective of property owners in the years since its formulation. Adding a component to the test, which *per se* eliminates takings for later conveyance to private interests, would only strengthen an already durable standard.

In fact, the only reported Michigan case that applied *Poletown* to approve a taking's constitutionality was, according to the court, factually indistinguishable from the *Poletown* case. In *City of Detroit v Vavro*, 177 Mich App 682; 442 NW2d

730 (1989), Detroit was taking land under the Economic Development Corporations Act to convey that land to Chrysler for creation of an auto assembly plant. The Court of Appeals concluded that the case was essentially identical to *Poletown* and that it was therefore bound by *stare decisis* to allow the condemnation to proceed. The Vavro Court could not distinguish *Poletown*, yet it permitted the taking only with severe reservations.⁴

Foreign courts have also used the *Poletown* “heightened scrutiny” standard in protection of private property rights. For example, the Supreme Court of Delaware, quoting *Poletown*, held in *Wilmington Parking Auth v Land with Improvements*, 521 A2d 227, 231 (Del, 1986), that property could not be taken for a parking lot when the lot would have predominantly benefited a private interest. And in *Casino Reinvestment Dev Auth v Banin*, 320 NJ Super 342, 346; 727 A2d 102 (1998), the New Jersey Superior Court applied *Poletown*’s “heightened scrutiny” standard to prevent condemnation for a hotel development that would have primarily benefited the private interest. Like the Michigan cases, these cases (and others) applied the *Poletown* analysis in defense, not abrogation, of private property rights.

Finally, various courts have noted the irony of *Poletown*: it created a standard protective of property rights but wrongly invoked its own test in furtherance a bad taking. See *Minneapolis Community Dev Auth v Opus*

⁴ See *Vavro*, *supra* at 685. Interestingly, Detroit settled *Vavro* after the Court of Appeals decision, paying market prices for the properties that it sought in order to prevent the Chrysler project from grinding to a halt were this Court to reverse the Court of Appeals’ decision. One other Michigan case cited *Poletown* in approving a taking, but that case was decided on jurisdictional grounds. See *City of Detroit v Lucas*, 180 Mich App 47, 50-51; 446 NW2d 596 (1989). *Lucas* addressed public use only in *dicta*. In any event, the Court of Appeals later disavowed *Lucas* in *Adell*, *supra*.

Northwest, LLC, 582 NW2d 596, 599 (Minn App, 1998). If this Court proceeds to review *Poletown*, it should address this misapplication of fact to law but not completely eradicate the standard that Michigan courts have repeatedly proven to be protective of private property rights since 1981.

CONCLUSION AND REQUEST FOR RELIEF

Amici Curiae Adell Childrens Funded Trusts respectfully request that this Court enter an order directing the trial court to reverse the Court of Appeals' decision and dismiss this action for the reasons set forth above.

Respectfully Submitted,

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